FILED
MAY 19 1992
OFFICE OF THE CLERK

(1)

91-1912
No.

In The

Supreme Court of the United States

October Term, 1991

MICHAEL SCOTT POWERS, Individually, and as Executor under the Last Will and Testament of VICKI SAUNDERSON POWERS, Deceased; ERIN POWERS, by Next Friend MICHAEL SCOTT POWERS; and MEGAN J. POWERS, by Next Friend MICHAEL SCOTT POWERS,

Petitioners,

vs.

KING COTTON, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

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QUESTION PRESENTED

Does the "due process" clause of the Fourteenth Amendment permit one person's settlement to be set off from another person's jury verdict in multi-party litigation without an allocation hearing?

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Petitioners,

vs.

KING COTTON, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Georgia entered in the above-entitled cause on February 19, 1992 vacating the writ of certiorari granted on

November 1991 to review the judgment and opinion of the Court of Appeals for the State of Georgia entered on July 3, 1991.

OPINION BELOW

The opinion of the Court of Appeals and subsequent orders entered by the Supreme Court are attached as Appendices A, B, C, D and E.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court was filed on January 30, 1992 and petitioners' motion for reconsideration was denied on February 19, 1992. The jurisdiction of this Court is invoked pursuant to 62 Stat. 929, 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use without just compensation.

(Emphasis added to pertinent section.)

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; deny to any person within its jurisdiction the equal protection of the laws.*

(Emphasis added to pertinent section.)

STATEMENT OF FACTS

This application arises out of two jury trials in the Superior Court of Dougherty County, Georgia and two appeals to the Georgia Court of Appeals. This action originated as a complaint for wrongful death and personal injury on behalf of two minors, an adult individual, the executor of an estate and the heirs of Vicki Saunderson Powers. The action was brought against multiple defendants. Toward the end of the first jury trial, a settlement was reached between all of the plaintiffs and two of the three original defendants. The settlement agreement included a minor child of Vicki Saunderson Powers who was not a party to the suit. Under the terms of the settlement the amount of the settlement was to be allocated among the various parties after a hearing before the probate judge of Dougherty County, Georgia. A jury verdict was returned in favor of the plaintiffs against the remaining defendant, King Cotton, Ltd. (hereinafter referred to as King Cotton), for individual amounts.

The Probate Court of Dougherty County, Georgia subsequently appointed Mr. Powers as guardian of the property and person of each minor and appointed a guardian *ad litem*. In accordance with the settlement agreement petitioners obtained a hearing before the Probate Court of Dougherty County and, following a hearing, the probate judge approved the amounts allocated to the minors' and estate's settlements. King Cotton moved to set aside the settlements so as to increase its setoff from the jury verdict, obtained a rule *nisi* and a second hearing was held before the probate judge. The probate judge entered an order refusing to set aside the settlements and no appeal was taken from this order by King Cotton.

The trial court judge then set off from each party's verdict the amount allocated to each party's settlement and King Cotton appealed. One of the issues involved in the first appeal was how to set off the settlement from the jury verdict since there were six different claims involved in the settlement and five different parties involved in the jury verdict. Enumeration of Errors, *King Cotton v. Powers,* 190 Ga. App. 845, 380 S.E. 2d 481 (1989).

In *King Cotton v. Powers,* 190 Ga. App. 845, 380 S.E. 2d 481 (1989) (hereinafter referred to as *King Cotton I*), the Georgia Court of Appeals required a new trial due to an erroneous jury charge and held that upon the retrial "the Court would then, of course, set-off the amount of the settlement *allocated to each plaintiff* from the jury's award." *King Cotton v. Powers,* 190 Ga. App. 845, 849, 380 S.E. 2d 481, 485 (1989) (emphasis supplied).

At the second trial, individual verdicts were again entered in favor of the plaintiffs and against King Cotton. King Cotton again appealed and the Georgia Court of Appeals voided the allocation approved by the lower court and the Court of Appeals in its first decision, refused to remand the case for a new allocation

hearing, lumped all of the individual claims together and set off the total amount of the settlement from the total amount of the jury verdicts without any attempt to distinguish the individual verdicts. No attempt was made to provide for a new hearing as to the amount of each party's settlement; the Court of Appeals arbitrarily refused to recognize the individual claims and simply lumped them all together. The result of this decision was to set off 100% of the second jury verdict and completely eliminate any recovery by petitioners from King Cotton.

The Supreme Court of Georgia denied petitioners' petition for certiorari on September 6, 1991, vacated that order on November 4, 1991 and granted certiorari to examine the procedure for settling multi-party litigation, accepted briefs, heard oral argument, vacated the writ of certiorari on January 30, 1992 and denied petitioners' motion for reconsideration on February 19, 1992.

REASONS FOR GRANTING THE WRIT

I.

WHEN THE ALLOCATION OF MULTIPARTY SETTLEMENTS IS VOIDED BY A STATE COURT, DUE PROCESS REQUIRES THAT INDIVIDUAL PARTIES HAVE AN OPPORTUNITY FOR A HEARING BEFORE A NEW ALLOCATION IS IMPOSED UPON THEM.

Imagine a situation where two children, John Doe and Mary Doe, are each injured when their family car collides with two other vehicles. The children settle with one of the joint tortfeasors and in the settlement John Doe receives $20,000 for his injuries and Mary Doe receives $1,000 for her injuries. At trial a jury verdict is returned against the remaining tortfeasor in the amount of $10,000 for John Doe and $10,000 for Mary Doe. Under the

rationale of the second *King Cotton* decision, Mary Doe receives nothing for her injuries since the $21,000 received by both children is set off from the $20,000 total of both verdicts. Under the rule adopted by the State of Georgia, such an egregious violation of due process is now controlling in the state court.

It is axiomatic that the due process requirements of the United States Constitution prevent such arbitrary and capricious results. "Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank v. Okely,* 4 Wheat. 235, 244. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary." *Caldwell v. State of Texas,* 137 U.S. 692, 697, 11 S. Ct. 224, 226 (1891). Petitioners are not requesting that this Court change a tort remedy or "federalize" state tort law. Petitioners seek the right to a hearing before the terms of their settlement agreement are changed and new settlement terms imposed upon them to their detriment. Petitioners attempted to have a hearing on the allocation of the settlement but that hearing was voided by the Court of Appeals. If the Court of Appeals wished to void the allocation hearing it should have remanded the case for a hearing on a new allocation of settlement proceeds. Refusing to recognize the allocation approved by the Probate Court does not allow the Court of Appeals to ignore due process and lump the claims together as one. Due process requires that some allocation be made. Petitioners must be afforded an opportunity for another hearing rather than having a court determine that no allocation will be allowed. "In *Vitek v. Jones,* 445 U.S. 480, 491, 100 S. Ct. 1254, 1263, 63 L. Ed. 2d 552 (1980), we pointed out that 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' "

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1492, 84 L. Ed. 2d 494 (1985).

The Fourteenth Amendment limitations on arbitrary and capricious exercise of governmental power are no less applicable when the violation results from rules of procedure rather than statutes. "In its Fourteenth Amendment, our Constitution imposes on the states the standards necessary to insure that judicial proceedings are fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 33, 101 S. Ct. 2153, 2163, 68 L. Ed. 2d 640 (1981). The procedure followed by the state courts of Georgia does not meet the test of "fundamental fairness" and results in an arbitrary and capricious method of computing setoffs in multi-party litigation.

Petitioners discussed allocation of the settlement with counsel for the settling parties and agreed that court approval of the allocation of the settlement would have to be obtained since claims asserted by minors and an estate were being compromised. "Both of us [*e.g.*, counsel for petitioners and the settling defendants] understood that whatever was done about the minor children and the estate would have to be approved by either the Superior Court or by the Probate Court." (H.15). "He said we have 750,000; it will have to be approved by the Probate Court." (H.35). The intent of the parties was carried out by submitting the compromises to the Probate Court for a hearing and obtaining approval of the allocation. However, in its eagerness to maximize the setoff available to the defendant below, the Court of Appeals found the Probate Court approved settlements to be void and by judicial fiat ruled that no allocation of the settlement was ever a part of the settlement.[1]

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1. Even King Cotton has not advanced this argument. It differed with petitioners over the amount of the settlement to be allocated to each partner (Cont'd)

The method used by the Georgia Court of Appeals to resolve multi-party settlements fails to meet the three part test of this Court announced in *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

> More precisely our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an eroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citations omitted.]

Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

The interest of petitioners affected by the official action is great. It is the interest of petitioners in having their property rights to the settlement proceeds fairly allocated among them after an opportunity for a hearing. The risk of enormous deprivation is patent. In this instance a jury verdict of over $700,000 has twice been reduced to zero. The probable value of additional procedural safeguards is great. A court adjudication on the allocation question

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(Cont'd)
but never argued that no allocation was necessary. This position of the court directly contradicts their findings in *King Cotton I* as well as the undisputed testimony of the attorneys involved in the settlement. This rationale appears to be an attempt to avoid discussing the obvious constitutional problems in the court's procedure.

after an evidentiary hearing would obviously increase the likelihood of a proper allocation. Additionally, the relative simplicity of the additional procedural requisites argues strongly against the Court of Appeals' approach to this case.

The patent flaw in the Court of Appeals' procedure is its arbitrary nature. "A system or procedure that deprives persons of their claims in a random manner, as is apparently true of ¶ 858(b), necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 102 S. Ct. 1148, 1157, 71 L. Ed. 2d 265 (1982). While it may have been expedient, the failure of the Court of Appeals to remand the case for an allocation hearing once it voided the original allocation virtually guaranteed that the offset would operate in a completely random manner against each individual's jury verdict.

The most flagrant violation of due process safeguards occurred in connection with the claims of the minor child who was not a party to this suit.[2] By including his settlement with the others and ruling that all of the settlements must be set off in a lump sum from all recoveries at trial, the Court of Appeals adjudicated that minor child's right to a recovery without his even being a party to the action. He now must also set off the amount of all of the settlements received by the other members of his family from his jury verdict in any future litigation. No matter what level of scrutiny is applicable, treating all of the claims as one fails the test for procedural due process.

In their two appearances before the Court of Appeals of the State of Georgia and their one appearance before the Supreme Court of the State of Georgia, petitioners have urged those courts

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2. The statute of limitations has not expired on his claim.

to address the due process problems created by denying them a right to a hearing before imposing new settlement terms upon them. However, the state courts of Georgia refuse to even entertain the notion that their arbitrary rule allowing the lumping together of multi-party settlements without a hearing is violative of the Constitution. They appear willing to sacrifice the rights of individual plaintiffs upon the altar of judicial expediency. This forum is the last opportunity for these petitioners to have access to the courts for the sole purpose of a procedural hearing on the allocation of their individual settlements.

After petitioners were successful in the second trial of their cause of action, the Court of Appeals of the State of Georgia struggled mightily to avoid dealing with the setoff issue directly. Despite uncontradicted testimony that the settlement required allocation among the plaintiffs and a minor child who was not a party to the lawsuit together with an agreement by the settling parties that court approval of the allocation must also be obtained, the Court of Appeals of the State of Georgia decided that it could ignore the intent of the parties and the necessity of allocation and simply mandate that each separate claim be combined into one lump sum and set off from the combined total of all separate verdicts. The tortured procedure followed by the Supreme Court of the State of Georgia in order to avoid addressing the clear due process problems with its setoff rule must not succeed. In recent years state court decisions have allowed parties to settle with some defendants while retaining their right to pursue their cause of action against nonsettling defendants. The increased use of settlements in multi-party litigation requires a strong message from this forum that the procedural rights of individual litigants must not be ignored by busy courts.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ALLOW A SETOFF WHERE THE AMOUNT OF THE SETOFF IS UNCLEAR.

In *Phillips v. Liberty Mut. Ins. Co.*, 813 F.2d 1173 (11th Cir. 1987) two plaintiffs settled with one defendant and proceeded to trial against a remaining defendant. The settlement agreement did not state the amount each plaintiff was to receive. Just as the attorney for King Cotton has argued in this case, Liberty Mutual argued that the settlements should be apportioned in proportion to the amount each plaintiff received at trial. The Eleventh Circuit recognized the problems inherent in such an arbitrary procedure and affirmed the trial court's refusal to apply a setoff at all, holding that the amount of the claimed offset must be "definite and readily ascertainable." *Phillips v. Liberty Mut. Ins. Co.*, 813 F.2d 1173, 1176 (11th Cir. 1987).

In this case the Georgia Court of Appeals has attempted to circumvent due process requirements by refusing to recognize any allocation of the settlement among the plaintiffs. However, this holding results in a completely arbitrary creation of new settlement terms with no procedural protection whatsoever. Without a definite and readily ascertainable offset, due process in the procedure is meaningless.

CONCLUSION

This case presents an important constitutional issue regarding the manner in which courts should address multi-party settlements. This Court has an opportunity to clarify the limits of and procedures to be used in court-imposed setoff procedures. This case has established a most dangerous precedent in an evolving area of the law which other lower courts might unwisely choose to adopt.

Respectfully submitted:

WILLIAM E. CANNON, JR.
MICHAEL S. MEYER von BREMEN
CANNON, MEYER von BREMEN & MEIER
Attorneys for Petitioners

APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA DATED FEBRUARY 19, 1992

SUPREME COURT OF GEORGIA

ATLANTA FEBRUARY 19, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91G1416

MICHAEL SCOTT POWERS ET AL. V. KING COTTON, LTD.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham and Fletcher, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX B — ORDER OF THE SUPREME COURT OF GEORGIA DATED JANUARY 30, 1992

SUPREME COURT OF GEORGIA

ATLANTA JAN 30 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

S91G1416. POWERS et al v. KING COTTON, LTD.

After plenary consideration of this matter, it is found not to satisfy the criteria for the grant of certiorari and the writ is therefore vacated.

Clarke, C.J., Weltner, P.J., Bell, Hunt, Benham and Fletcher, JJ. concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Lynn M. Stinchcomb, Deputy Clerk.

APPENDIX C — ORDER OF THE SUPREME COURT OF GEORGIA DATED NOVEMBER 4, 1991

S91C1416

SUPREME COURT OF GEORGIA

ATLANTA November 4, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

MICHAEL SCOTT POWERS et al. v. KING COTTON, LTD.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that this Court's judgment of September 6, 1991, denying certiorari be hereby vacated. All the Justices concur, except Bell, Hunt and Fletcher, JJ., who dissent.

Court of Appeals No.
A91A0447

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Lynn M. Stinchcomb, Deputy Clerk.

APPENDIX D — LETTER OF THE SUPREME COURT OF THE STATE OF GEORGIA, CLERK'S OFFICE, ATLANTA DATED SEPTEMBER 6, 1991

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: SEPTEMBER 06, 1991

Mr. William E. Cannon, Jr.
Cannon & Meyer Von Bremen
P.O. Box 343
Albany Ga 31702

Case No. S91C1416

MICHAEL SCOTT POWERS ET AL. V. KING COTTON, LTD.

COURT OF APPEALS CASE NO. A91A0447

The Supreme Court today denied the petition for certiorari in this case.

All the justices concur, except Smith, P.J., who dissents.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

APPENDIX E — DECISION OF THE COURT OF APPEALS OF GEORGIA

In the Court of Appeals of Georgia

A91A0447. KING COTTON, LTD. v. POWERS et al. Ca-029R

CARLEY, Judge.

This is the second appearance of the instant tort action before this court. In *King Cotton, Ltd. v. Powers,* 190 Ga. App. 845 (380 SE2d 481) (1989), we reversed the judgment that had been entered on a jury verdict in favor of appellee-plaintiffs. A new trial was held and a jury verdict was again returned in favor of appellees. Appellant-defendant appeals from the judgment that was entered by the trial court on this jury verdict.

1. Any issue that was raised and resolved in the earlier appeal is the law of the case and, notwithstanding appellant's request for reconsideration, is binding. *Redmond v. Blau,* 153 Ga. App. 395 (265 SE2d 329) (1980).

2. Prior to the return of the verdict in the first trial, appellees agreed to a collective settlement with all defendants in the case except appellant. This collective settlement was for the lump sum amount of $750,000 and was not otherwise allocated as between the respective claims of the various appellees. After the return of the verdict in the first trial, but prior to the entry of any judgment thereon, an order of the probate court was obtained which purported to allocate specified amounts of the $750,000 to the minor appellees. This order of probate court was not considered by the trial court in molding the original judgment and was not, therefore, considered in *King Cotton, Ltd. v. Powers,* supra. However, in molding the instant judgment, the trial court did rely, over appellant's objection, on the probate court's

allocation order. Appellant enumerates this reliance by the trial court as error.

Appellant was neither a party to the proceedings in the probate court (compare *Taylor v. Bennett,* 260 Ga. 20 (389 SE2d 242) (1990)), nor does it seek merely to attack collaterally the probate court's appointment of a guardian for the minor appellees. Compare *Bennett v. Bennett,* 194 Ga. App. (390 SE2d 276) (1990). Instead, appellant ultimately questions the jurisdiction of the probate court to make a binding determination as to the settlement reached on behalf of the minor appellees. "The judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." OCGA § 9-12-16.

A probate court clearly has jurisdiction to appoint a guardian for a minor. OCGA § 15-9-30 (a) (5). However, a guardian, once appointed, need not obtain the approval of the probate court to settle a contested or doubtful claim for or against the minor. OCGA § 29-2-16; *Macris v. Laughlin Insulation Co.,* 124 Ga. App. 573, 574 (1) (185 SE2d 413) (1971). Compare OCGA § 29-2-10. Accordingly, any settlement of the tort claims of the minor appellees to which their duly appointed guardian agreed would not have to be approved by the probate court. Hovever, the approval of the trial court would be necessary here because the settlement was reached after litigation of the minor appellees' claims had commenced. "[O]nce a suit is in progress even a guardian ad litem or next friend . . . may not compromise or settle the child's claim without the approval of the [trial] court. [Cit.]" *Lynn v. Wagstaff Motor Co., Inc.,* 126 Ga. App. 516, 518 (191 SE2d 324) (1972). Since it was not the probate court but the trial court wherein the suit was pending that had

jurisdiction to address the settlement of the minor appellees' claims, it follows that, in molding the instant judgment, the trial court erred in relying upon the probate court's void order. " 'A guardian ad litem or next friend has no authority to compromise or settle a suit except by leave of the [trial] court . . .' [Cits.]" *Betts v. Hancock*, 27 Ga. App. 63, 65 (d) (107 SE 377) (1921). The judgment in the instant case should have been molded so as to conform to the settlement agreement without regard to the probate court's void order purportinng to allocate a portion of the settlement amount.

Whether approving a minor's settlement of a pending suit in specific or considering the enforceability of any settlement agreement in general, a trial court is obviously limited to those terms upon which the parties themselves have mutually agreed. Absent such mutual agreement, there is no enforceable contract as between the parties. *Mangum v. Mills*, 108 Ga. App. 535 (133 SE2d 429) (1963); *Manget v. Carlton*, 34 Ga. App. 556 (3) (130 SE 604) (1925). "It is the duty of couts to construe and enforce *contracts as made*, and not to make them for the parties." (Emphasis supplied.) *Carr v. L. & N. R. Co.*, 141 Ga. 219, 222 (80 SE 716) (1914). The only settlement agreement in the instant case upon which there was *any* purported mutual agreement was that whereby all appellees agreed to settle as against all defendants other than appellant for the unallocated lump sum of $750,000. Any further agreement as between appellees themselves concerning their allocation of the $750,000 as among themselves may have been tangential to the agreement that had been reached with the settling defendants. However, such an allocation among the appellees, not having been a term which was agreed to by the settling defendants, would *not* be an element of the settlement agreement itself.

Appendix E

In *King Cotton, Ltd. v. Powers,* supra at 849 (2), we held: "Upon retrial, either the settlement amount may be disclosed to the jury and the jury instructed to consider that amount in awarding its verdict against [appellant], or the amount of the settlement must be withheld from the jury and the jury instructed to disregard any dismissals from the action and anything they may have heard regarding settlement and return a verdict for the total amount due each plaintiff as a result of the accident. *If the latter option is elected, the court would then, of course, set off the amount of the settlement allocated to each plaintiff from the jury's award.* [Cit.]" (Emphasis supplied.) Upon retrial, it was "the latter option" which was followed. Accordingly, in molding the instant judgment, the trial court was required to "set off the amount of the settlement allocated to each [appellee] from the jury's award." As discussed above, the settlement agreement did not allocate any *specific* portions of the $750,000 to the appellees individually, but provided for an unallocated lump sum payment of $750,000 in collective settlement of all of appellees' respective claims. Therefore, in molding the instant judgment, the trial court would be required to set off the *entire* unallocated settlement payment of $750,000 against the *total* amount of the verdicts returned for all appellees.

This would be necessary because of appellees' *own* election to aggregate their individual claims and to enter into a collective unallocated lump sum settlement with the other defendants. Each appellee was entitled to but one full satisfaction of his injury and, in pro tanto satisfaction thereof, appellant was entitled to the full benefit of the $750,000 paid by the other defendants. *Ford Motor Co. v. Lee,* 237 Ga. 554, 556 (2) (229 SE2d 379) (1976). To insure this result, it would obviously be necessary that appellees' own treatment of their claims be consistent. Having aggregated their individual claims and entered into a collective unallocated

lump sum settlement with the other defendants, appellees would not be entitled thereafter to resegregate their claims and manipulate their allocation of the settlement amount among themselves so as to secure more than one full satisfaction and to deny appellant the full benefit of the $750,000 as a set off. "[I]n a tort action, compensation, and not enrichment, is the basis for the award of damages." *Atlantic Coast Line R. Co. v. Ouzts*, 82 Ga. App. 36, 58 (2) (60 SE2d 77) (1950). "The plaintiffs in the case must stand upon the contract as made by the parties." *Carr v. L. & N. R. Co.*, supra at 222. The settlement contract "as made by the parties" and upon which appellees "must stand" was for an unallocated lump sum payment in collective settlement of all of appellees' respective claims. Consistent with that contract, appellees would be required to aggregate the total amounts of their individual verdicts obtained against appellant, then set off there from the entire $750,000 unallocated settlement payment and, if, after doing so, there was any lump sum monetary recovery against appellant, resolve as between themselves the issue of the allocation of that lump sum recovery.

3. Remaining enumerations of error have been considered and are without merit.

4. The judgment is affirmed with direction that the trial court is to remold the judgment consistent with our holding in Division 2 of this opinion.

Judgment affirmed with direction. Banke, P.J. and Beasley, J., concur.

(2)

Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

No. 91-1912

In The

Supreme Court of the United States

October Term, 1991

MICHAEL SCOTT POWERS, Individually, and as Executor under the Last Will and Testament of VICKI SAUNDERSON POWERS, Deceased; ERIN POWERS, by Next Friend MICHAEL SCOTT POWERS; and MEGAN J. POWERS, by Next Friend MICHAEL SCOTT POWERS,

Petitioners,

vs.

KING COTTON, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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2017
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QUESTION PRESENTED

Where multiple plaintiffs are represented by one (1) individual serving as his own representative, as the representative of an estate and as the representative of minor plaintiffs, can he constitutionally waive allocation among the various claims?

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Case Cited:

Phillips v. Liberty Mutual Insurance Company, 813 F.2d 1173 (11th Cir. 1987) 5

No. 91-1912

In The

Supreme Court of the United States

October Term, 1991

MICHAEL SCOTT POWERS, Individually, and as Executor under the Last Will and Testament of VICKI SAUNDERSON POWERS, Deceased; ERIN POWERS, by Next Friend MICHAEL SCOTT POWERS; and MEGAN J. POWERS, by Next Friend MICHAEL SCOTT POWERS,

Petitioners,

vs.

KING COTTON, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

As the result of an accident which occurred on October 11,

1986, the family of Michael Scott Powers received various damages including personal injuries to the Husband, Michael Scott Powers, the death of the Wife, Vicki S. Powers, and personal injuries to two (2) children, Erin Powers and Megan Powers. Suit was instituted in the Superior Court of Dougherty County, Georgia, by Michael Scott Powers on behalf on himself, the Estate of his Wife, and as Next Friend of the two (2) minor children. The suit was originally against the driver and owner of the tractor-trailer truck which collided with the Powers' vehicle and King Cotton, Ltd., Respondent herein, the owner of the business from which the truck was leaving at the time of the accident. (There is no relationship between King Cotton and the truck except that of business invitee.)

At the conclusion of the evidence in the first trial, Michael Scott Powers, on behalf of all Petitioners, agreed to a lump sum settlement of $750,000 with the driver and the owner of the truck. The settlement was not allocated by Mr. Powers among the Petitioners even though Respondent indicated to the court prior to the jury's verdict that an allocation of the settlement needed to be made for purposes of set-off. This suggestion was vehemently objected to by Counsel for the Petitioners and he stated to the trial court that there would not be any problem without an allocation since "if the set-off is applicable, it is applicable . . . ."

What Powers was in fact planning was to wait until after the jury returned its verdict so that he could then gerrymander the settlement among the Petitioners to minimize the set-off to which King Cotton would be entitled. Powers waited until after the jury verdict and then immediately went into the Dougherty County Probate Court and petitioned for gerrymandered settlements, all without the knowledge of Respondent, its Counsel or even the trial judge. After this fact was discovered, Respondent petitioned the Probate Court to set aside its orders authorizing the various settlements but the Probate Court declined to consider

the petition of Respondent since its original petitions and orders were facially correct. The Probate Court did *not* conduct a hearing on the merits of the allocations of the settlements.

The judgment entered after the first trial was reversed by the Georgia Court of Appeals and the case was remanded for retrial. Because of the controversy over the issue of set-off, the Court of Appeals gave instructions that either the settlement be disclosed and the jury instructed to consider the settlements in making its verdict or that the settlement should be withheld from the jury and the court would then set-off the amount of the settlement allocated to each Petitioner from the jury's award. Although Respondent wanted to prove the settlements, Petitioners objected to disclosure of the settlement amounts to the jury and Respondent, at Petitioners' request, was ordered by the trial court not to do so. After the second trial the Georgia Court of Appeals held, consistent with its first opinion, that since the settlement had been withheld from the jury and since there had been no proper allocation of settlement by Petitioners as required by law, but merely sham proceedings in the Probate Court which were a nullity, then the only settlement which had been reached was the unallocated lump sum of $750,000 which Powers had purposedly and consciously chosen to leave as a lump sum for all Petitioners that he represented. Thus, the set-off to which Respondent is entitled should be the total of the collective settlement which had been reached, against the total verdicts returned.

REASONS FOR DENYING THE WRIT

Petitioners suggest that this Petition presents to the Court a case wherein the due process clause of the Constitution has been violated. To the contrary, the due process clause is not even at issue in this litigation and what Petitioners are attempting to induce this Court to do is to rehash an issue which has been before the

appellate courts of the State of Georgia and resolved against Petitioners, primarily because of Petitioners own conduct and choice of litigation tactics. There is no constitutional issue for this Court's consideration.

I.

PETITIONERS HAD AMPLE OPPORTUNITY TO SEEK JUDICIAL ALLOCATION OF MULTIPLE PARTY SETTLEMENTS BUT CHOSE NOT TO DO SO IN THE HOPES THAT THEIR ELECTION NOT TO HAVE AN ALLOCATION WOULD BENEFIT THEM AND CANNOT NOW COMPLAIN THAT THEY MADE THE WRONG DECISION.

Petitioners attempt to gain this Court's attention by making reference to the Fourteenth Amendment of the Constitution but they fail to acknowledge that they find themselves in a position of their own making and that the issue of allocation of settlements is a state matter and not a federal question. There is no authority for Petitioners' proposition that the law of the State of Georgia regarding the allocation of settlements and the issue of set-off of settlements against jury verdicts is controlled by federal or constitutional law. Rather, this is merely a tort concept which is to be decided and applied on a state by state basis and according to the wisdom of each individual state's legislature and courts. Contrary to Petitioners' statement, they are attempting to "federalize" state tort law and nothing more. Petitioners fail to cite any authority for the proposition that this Court should inject itself into this process because there is no such authority.

Such matters as the handling of settlement by joint tortfeasors, the effect of a release or covenant not to sue, the effect of dismissal of litigation against joint tortfeasors, and similar issues are dealt with by the various states as they see fit. There is no federal law

which is applicable and there is absolutely no basis for any argument that Georgia law does not provide due process.

The law of the State of Georgia provides and guarantees a proper standard of fundamental fairness to the issue of set-offs and Petitioners should be denied certiorari because of the fact that Petitioners find themselves in a position of their own making which results from a calculated gamble which they took and lost. It is ironic that Petitioners now seek this Court's assistance in ordering that there be an allocation hearing of the settlement which they entered into with the settling Defendants when it was Respondent that requested that Petitioners be forced to determine and announce their allocation before the first jury verdict was returned and again after the first verdict was reversed but before the second trial was conducted, with Petitioners consistently resisting any honest allocation. The record is full of objections by the Petitioners to attempts to obtain a binding and valid allocation and Petitioners can hardly be serious when they now complain that the appellate courts of the State of Georgia have ruled that their refusal to have a proper allocation amounts to a waiver and a decision to treat the claims collectively.

II.

THE AMOUNT OF THE SET-OFF IS CLEAR AND PRECISE.

Petitioners allege that the set-off to be received by Respondent is "unclear" but what Petitioners are truly saying is not that the set-off is unclear but that they are unhappy with it. Petitioners refer this Court to *Phillips v. Liberty Mutual Insurance Company,* 813 F.2d 1173 (11th Cir. 1987), but then totally misrepresent the focus of that case. The importance of that case is the fact that if a defendant takes no steps to protect itself and to require an allocation, then the defendant cannot obtain an allocation after

the fact. Conversely, if Petitioners refuse to have an allocation then they should not now be heard to complain since they waived their right to obtain one, hoping to be able to increase their award and to obtain a double recovery against Respondent.

CONCLUSION

This case presents no constitutional issues at all and does not meet the minimum criteria for certiorari to this Court.

Respectfully submitted,

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